AT&T had engaged in "egregious misconduct" with malice or fraudulent intent.[34] In that connection, AT&T noted that its employment of telemarketers who obtain customer orders during afternoon and evening hours was clearly a legitimate business practice. Moreover, AT&T stated that any allegations regarding "dumping of orders" were untenable, particularly when SWBT excluded all but 10% of AT&T's orders in calculating performance results for PM 27.

23. In its complaint, AT&T also argued that, even assuming *arguendo* that SWBT could somehow show that AT&T had acted in bad faith during the ordering process -- and it most assuredly could not -- SWBT has no legal basis upon which it can properly withhold liquidated damages under the Texas remedy plan. Under the Texas remedy plan, SWBT is not permitted to withhold payments below the procedural cap of $3 million per month unless: (1) SWBT has instituted an expedited dispute resolution proceeding on or before the due date of the penalty payments;[35] and (2) the TPUC has found that SWBT's performance failure "was the result of an act or omission by a CLEC that is in bad faith."[36] This requirement underscores that, under the Texas remedy plan, SWBT cannot withhold liquidated damages payments absent a prior TPUC finding. In fact, during hearings before the Illinois Commerce Commission an SBC witness, in discussing similar provisions in Ameritech's remedy plan, testified that unless

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[34] *Id.* at 3.

[35] Attachment 17: Performance Remedy Plan – TX (T2A) § 10.4 (providing that SWBT cannot withhold payments below the procedural threshold "unless SWBT had commenced an expedited dispute resolution proceeding on or before the payment due date").

[36] Attachment 17: Performance Remedy Plan – TX (T2A) § 7.2 (stating that "SWBT shall not be obligated to pay liquidated damages . . . if the Commission finds such noncompliance was the result of an act or omission by a CLEC that is in bad faith"). Under Section 7.3.1 of the Texas remedy plan, SWBT can also institute a proceeding to show "why, under the circumstances, it would be unjust to require it to pay liquidated damages" that exceed the $3 million monthly procedural cap for an individual CLEC. However, even when liquidated damages payments exceed that cap, SWBT must pay the balance in escrow and demonstrate that any such penalty payments are unjust. SWBT has not invoked and cannot properly invoke Section 7.3.1 because its penalty payments to AT&T are well below the procedural threshold.

Ameritech "initiat[es] an expedited procedure before the remedy payments are due, the penalty payments must be paid to the CLECs."[37] Remarkably, however, in clear contravention of the express language in the plan, SWBT withheld AT&T's penalty payments without commencing an expedited dispute resolution proceeding and without prior approval from the Texas PUC.[38]

24. It should be noted that AT&T also urged the TPUC to reject SWBT's proposal to reclassify PM 27 as a "diagnostic" measure -- which it had effectively and unilaterally done by withholding penalty payments in violation of the explicit provisions of the remedy plan. AT&T argued that any consideration of that issue should be resolved in the next six-month review and not through SWBT's unilateral and retroactive modification of the performance measure. The Texas PUC has not yet ruled upon AT&T's complaint.

25. These most recent events demonstrate that the Commission should not and must not take solace in any representations that SWBT makes in this proceeding regarding the efficacy of the remedial provisions in its Texas remedy plan -- the same provisions which are incorporated in its Missouri and Arkansas remedy plans. Indeed, SWBT -- before it received Section 271 approval in Texas – indicated to this Commission that the Texas remedy plan would operate like a well-oiled machine triggering automatic penalty payments. Unfortunately, after SWBT obtained Section 271 approval, SWBT reversed course. SWBT's recent actions confirm that it now views the Texas remedy plan as a tool that it is free to ignore or manipulate to avoid entirely or delay experiencing financial consequences for discriminatory conduct.

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[37] *In the Matter of Petition for Resolution of Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order*, No. 01-0120 (Ill. Commerce Comm.) Tr. 275 (Levy) (Aug. 31, 2001) (Ex. 7).

[38] By withholding penalty payments under these circumstances, SWBT breached the Texas interconnection agreement between SWBT and AT&T which incorporates the Texas remedy plan.

26. By SWBT's own admission, the Missouri and Texas remedy plans are "mirror images" of the Texas plan. In view of SWBT's most recent conduct in Texas, it is plainly evident that SWBT will undoubtedly ignore, unilaterally modify or distort the same provisions in the Missouri and Arkansas remedy plans to avoid making liquidated damages payments whenever it suits its purposes, thereby shifting to CLECs the burden of initiating litigation to collect what were supposed to be automatic payments triggered by seamless, strictly-enforced, self-executing mechanisms.[39] Accordingly, there is no sound basis upon which the Commission can properly conclude that the Missouri and Arkansas plans serve as probative evidence that "SWBT will continue to provide CLECs with nondiscriminatory review following Section 271 relief."[40]

IV. THE MISSOURI AND ARKANSAS REMEDY PLANS WILL NOT REFLECT CHANGES IN THE MARKETPLACE.

27. In its *New York 271 Order*, the Commission "applaud[ed] the role played by the New York Commission in providing a forum for ongoing modification and improvement of the performance metrics."[41] Moreover, the Commission found that, by virtue of the ongoing collaborative process, the New York performance monitoring and remedy plan would be modified as needed "to reflect changes in the telecommunications industry and in the New York market."[42] Similarly, when it approved SWBT's Texas 271 application, the Commission stated

[39] The Arkansas and Missouri performance remedy plans contain the same Section 7.2 provision in the Texas remedy plan that excuses SWBT from paying liquidated damages for performance failures due to "an act or omission by a CLEC that is in bad faith." Attachment 17: Performance Remedy Plan -- MO (M2A) § 7.2; Attachment 17: Performance Remedy Plan -- AR (A2A) § 7.2.

[40] SWBT AR/MO Br. at 156.

[41] *New York 271 Order* ¶ 438.

[42] *Id.*

that the six-month review process "is an important feature because it allows the Plan to reflect changes in the telecommunications industry and in the Texas market."[43]

28. In its application, SWBT has applauded the six-month review process as the proper vehicle for resolving performance measurement issues and ensuring that its remedy plan continues to evolve in accordance with commercial experience. For example, in its initial Missouri 271 application, SWBT extolled the extensive efforts of the Texas PUC and the carriers during the six-month review process that resulted in refinements to performance measures and stated that, "[g]iven these positive by-products of the collaborative review, it is understandable that the FCC has twice lauded the SWBT Performance Measurements Plan's ability to evolve as 'an important feature.'"[44] And as noted above, when it has suited its purposes, SWBT has insisted that the six-month review is the appropriate forum in which to resolve issues relating to the business rules governing or the actual implementation of performance measures.

29. In its pending application, SWBT emphasizes that it is committed to ensuring that its remedy plans continue to evolve to reflect changes in the marketplace. As proof of that commitment, SWBT claims that it has "implement[ed] all changes that were ordered by the Texas PUC in its six-month review process."[45] However, this representation is belied by SWBT's recent publicly-stated positions before the Texas PUC confirming that SWBT has *not* implemented all changes to performance measures ordered by the Texas PUC, and that SWBT has *no* intention of complying with any future orders issued by the Texas PUC emanating from

[43] *Texas 271 Order* ¶ 425.

[44] Dysart MO Aff. ¶ 16, (April 2, 2001).

[45] SWBT AR/MO Br. at 156.

the six-month review process absent SWBT's concurrence or an independent arbitration proceeding.

30. Since SWBT's Texas 271 application was approved, the Texas PUC has convened two six-month review proceedings. The second six month review proceeding culminated in an order from the Texas PUC directing SWBT to implement certain revisions to performance measures and to pay liquidated damages "based on the discrepancy of corrected data that overstated its performance delivered to CLEC."[46] The second six-month review proceeding that preceded the Texas PUC's issuance of this order included two full days of hearing during which eleven witnesses presented testimony on behalf of SWBT. These proceedings provided SWBT with ample opportunity to present any evidence that it considered probative of the matters at issue. Additionally, extensive off-the-record informal conferences were conducted at the direction of the TPUC, and all parties had the opportunity to submit written statements to the TPUC regarding any disputed issues.

31. Incredibly, after the six month review process, two full days of hearings, extensive off-the-record informal conferences, and the issuance of an order by the TPUC, SWBT filed a petition for reconsideration challenging the very authority of the TPUC to compel it to comply with any order arising out of the six-month review process. In this regard, in its petition for rehearing, SWBT advised the TPUC that certain aspects of its order were "regrettably unacceptable."[47] In an effort to bolster this misguided allegation, SWBT maintained that the

[46] Order No. 33 Approving Modifications to Performance Remedy Plan and Performance Measurements, Project No. 20400, *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas* (without attach.) (Ex. 8).

[47] Southwestern Bell Telephone Company's Motion for Rehearing and Clarification, Project 20400 (Tex. PUC) (July 2, 2001) at 3 (Ex. 9).

changes to the measures and remedies ordered by the Texas PUC were of "no benefit to CLECs or to the public."[48] Among the directives that SWBT found "unacceptable" and presumably of "no benefit to CLECs" were requirements that SWBT implement new special access performance measures, institute a sampling methodology regarding the accuracy of its loop qualification database, and pay damages for failing to follow business rules and violating performance standards for Performance Measure 13 that measures SWBT's flow-through rates.

32. Notably, SWBT maintained that it had absolutely *no* obligation to comply with any order resulting from the six month review process directing it to implement changes to existing measures absent its consent. And SWBT maintained that the TPUC could *not* force it to implement any new measures that were not to its liking, stating:

> SWBT's Filing on July 2, 2001 was intended to advise the Commission and the parties of its disagreement with certain aspects of Order No. 33. Absent consent by SWBT to implement all of the directives arising out of this PM collaborative proceeding, the Commission cannot require implementation without mutual agreement of the parties or, with respect to new measures, unless and until an arbitration on the record subject to appellate rights is conducted.[49]

33. Additionally, SWBT informed the TPUC that it could *not* compel it to make liquidated damages payments:

> [T]he Performance Remedy Plan is a form of liquidated damages to which both parties must voluntarily agree in order for the remedy to be lawful and binding, as was done in the T2A. SWBT does not agree to liquidated damages for these identified PMs and any attempt to compel a negotiated agreement would constitute a violation of SWBT's constitutional rights to due process.[50]

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[48] *Id.*

[49] Reply of Southwestern Bell Telephone Company, Project No. 20400 (Tex. PUC) (July 13, 2001) at 2 (Ex. 10).

[50] Southwestern Bell Telephone Company's Motion for Rehearing and Clarification, Project No. 20400 (Tex. PUC) (July 2, 2001) at 4 n. 3 (Ex. 9).

34. Further, during its review of DSL performance measures, the Texas PUC Staff requested that the parties submit any proposed revisions to the Texas performance remedy plan that would provide incentives for SWBT to improve its performance with respect to DSL performance measurements. In response to that request, SWBT stated that "the Performance Remedy Plan cannot be changed without the mutual consent of the parties . . . [and that it] is *not amenable to changes* in the plan based on its current high level of performance."[51]

35. Thus, SWBT's on-the-record positions in Texas crystallize the following salient facts. According to SWBT: (1) any order that the TPUC has entered or will enter in the six-month review proceedings is nothing more than a non-binding recommendation that it is perfectly free to reject; (2) the TPUC has no authority to impose any changes to existing performance standards or remedies absent its consent; (3) the TPUC has no authority to compel SWBT to pay liquidated damages unless SWBT so agrees; (4) the TPUC has no authority to direct SWBT to implement any new measures absent its consent or a separately conducted arbitration proceeding; and (5) even after a separate arbitration proceeding, SWBT has no obligation to comply with any order unless its rights to appeal have been exhausted.

36. Clearly, six month performance measure review proceedings with evidentiary hearings culminating in orders that SWBT is free to ignore -- coupled with motions for rehearing and separate arbitration and appeals proceedings -- could not possibly constitute the kinds of seamless, self-executing remedial mechanisms that this Commission envisioned when it

[51] Southwestern Bell Telephone Company's Proposal with Regard to the Performance Remedy Plan, Project No. 20400 (Tex. PUC) (Aug. 15, 2001) at 1 (Ex. 11) (emphasis added). *See also* Southwestern Bell Telephone Company's Response to AT&T's Recommendations for SWBT Performance on DSL-Related Measures Review at the June 29, 2001 Workshop Motion to Include Line-Sharing Performance Measures Within LMOS Audit, and Recommendations of XO Texas, Inc. Regarding Remedies for SWBT Performance on Key Measures Affecting Facilities-Based Providers, Project No. 20400 (Tex. PUC) (Aug. 31, 2001) at 29 (Ex. 12) (stating that the "remedy plan, under the express terms of the T2A, can only be changed by mutual agreement of the parties . . . [and] *SWBT is not agreeable to any changes in the performance remedy plan at this time*") (emphasis added).

approved SWBT's Section 271 application in Texas. Importantly, although SWBT holds forth in its Joint 271 Application that it has "demonstrated the 'continuing ability of the[se] measurements to evolve' by implementing all changes that were ordered by the Texas Commission in its six-month review process,"[52] conspicuously absent from SWBT's submission is any reference to its pending petition for reconsideration in Texas assailing the very authority of the Texas PUC to force it to comply with orders resulting from the six-month review process.

37. Against this backdrop, the Commission should give no evidentiary weight to SWBT's representations here that it has implemented all changes to measures ordered by the Texas PUC, or that the six-month review process in its remedy plans will generate necessary revisions to performance measures and remedies that will keep pace with the ever-evolving changes in the telecommunications market. Recent history confirms that any representations that SWBT makes here regarding the efficacy of the Texas remedy plan and its Missouri and Arkansas counterparts simply cannot be credited. Moreover, any promises that SWBT could possibly make regarding any future compliance with orders resulting from the six-month review process have no probative value. As the Commission has previously held, "a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of Section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof."[53]

38. It must also be emphasized that SWBT's current position challenging the very authority of the Texas PUC to compel it to comply with orders resulting from the six-month review process has far-reaching and serious consequences. Because SWBT views any orders

[52] SWBT AR/MO Br. at 156.

[53] *Michigan 271 Order* ¶ 55 (emphasis in original).

arising out of the six-month review process as nothing more than non-binding recommendations that SWBT can freely ignore, resource-constrained CLECs must now seriously reevaluate whether it is worthwhile to participate in any such collaborative proceedings. For the last six-month review alone, I and two members of my organization spent in excess of 120 person hours and $12,000 in travel expenses to attend off-the-record conferences, as well as the two-day hearing in Austin.

39. In addition, if SWBT is free to compel a separate arbitration proceeding and exhaust the appeal process before complying with orders issued by the Texas PUC, SWBT can delay indefinitely making meaningful payments for plainly discriminatory conduct. Further, if SWBT can avoid complying with orders issued by the Texas PUC arising out of the six month review process absent its consent, SWBT clearly has no incentive to reach any agreement with CLECs on matters that will facilitate competitive entry. Thus, SWBT's current stance in Texas regarding the six-month review process threatens to undermine the collaborative processes that this Commission deemed essential in assuring that performance monitoring and remedial plans continue to evolve to keep pace with changes in the telecommunications market.[54]

40. In concluding that the public interest would be satisfied by granting SWBT's Texas 271 application, the Commission relied, in part, on its finding that the Texas performance remedy plan "provides additional assurance that the local market will remain open after SWBT receives section 271 authorization."[55] In reaching that conclusion, the Commission found that the six month review process in the Texas remedy plan therein would assure that any

[54] *See e.g., New York 271 Order* ¶438 nn. 1338-1339 (recognizing the New York Commission's steps to assure the continuous development and refinement of performance measures).

[55] *Texas 271 Order* ¶ 420.

required refinements to any measures are made.[56] The establishment and enforcement of performance measures and remedies in a time frame that is consistent with the dynamics of the marketplace are absolutely essential to competitive entry. SWBT's most recent actions in Texas illustrate that SWBT will not comply with any order arising out of the six-month review process without its consent or without forcing the CLECs to extract penalty payments or enforce performance standards through protracted proceedings at considerable expense.

41. SWBT's positions and actions in Texas show that SWBT has successfully avoided paying AT&T liquidated damages to which it is entitled, defied the authority of the TPUC, ignored or unilaterally modified the express provisions of the Texas remedy plan, and attempted to force the CLECs to collect liquidated damages and enforce performance standards through proceedings that undermine the Commission's stated goal of having "self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention."[57] Because the Missouri and Arkansas remedy plans are carbon copies of the Texas plan, this Commission should not and must not accept SWBT's representations here that those plans provide strong assurance that it will satisfy its statutory obligations after receiving Section 271 approval. The evidence is plainly to the contrary.

[56] *Id.* at ¶ 425, n. 1243.

[57] *Michigan 271 Order* ¶ 394; *Second Bellsouth Louisiana Order* ¶ 364.

I, Sarah DeYoung, declare under penalty of perjury that the foregoing is true and correct.

Sarah DeYoung

Executed on September 10, 2001.

Exhibit 1

AT&T
8/31/01

TABLE OF CONTENTS

PROJECT NO. 20400

SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY OF TEXAS	§ § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

AT&T COMMUNICATIONS OF TEXAS, L.P.'S SURREPLY TO SWBT'S MOTION FOR REHEARING AND CLARIFICATION

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cc: All Parties of Record

PROJECT NO. 20400

SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY OF TEXAS	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

AT&T COMMUNICATIONS OF TEXAS, L.P.'S SURREPLY TO SWBT'S MOTION FOR REHEARING AND CLARIFICATION

The Reply of Southwestern Bell Telephone Company confirms one thing. SWBT's pending Motion for Rehearing and Clarification poses a grave threat to the six-month performance measures review process incorporated into the Texas 271 Agreement. More broadly, the positions taken by SWBT threaten to undermine this Commission's use of the collaborative process for purposes of section 271 compliance monitoring. AT&T takes the unusual step of filing a surreply for this Commission's consideration in an effort to make clear just what SWBT has placed at stake by its Motion and Reply.

I. Order No. 33 Is An Order, Not an Advisory Recommendation

SWBT's reply candidly confirms SWBT's view that Order No. 33 has no legal force, but is merely an advisory recommendation, which will not bind SWBT in the absence of SWBT's agreement or an independent arbitration proceeding:

> SWBT's filing on July 2, 2001 was intended to advise the Commission and the parties of its disagreement with certain aspects of Order No. 33. Absent consent by SWBT to implement all of the directives arising out of this PM collaborative proceeding, the Commission cannot require implementation without mutual agreement of the parties or, with respect to new measures, unless and until an arbitration on the record subject to appellate rights is conducted.

SWBT Reply at 2. The implication is clear, and extends well beyond Order No. 33 – according to SWBT, every order that the Commission has entered or will enter in

six-month performance measure review proceedings, in Project No. 20400 more generally, and in any proceeding that utilizes the collaborative process and workshop format, is nothing more than a non-binding recommendation to the parties. That position must be squarely rejected here.

The six-month review proceedings that preceded the Commission's issuance of Order No. 33 included two full days of on-the-record proceedings, the transcript of which exceeds 500 pages. *See* Project No. 20400, Tr. 1-538 (April 4-5, 2001). All persons presenting evidence were placed under oath. Tr. at 5, 87, 302. At least eleven different witnesses presented evidence on behalf of SWBT during these two days.[1] SWBT, like other participants, was represented by counsel throughout these two days of proceedings. The on-the-record workshops followed extensive off-the-record informal conferences among the parties, conducted at the Commission's direction. The parties also were provided the opportunity to make, and did make, written submittals to the Commission on disputed issues, both prior to and following the on-the-record workshops. No limitation was placed on the length or content of those written submittals.

These proceedings provided SWBT with a full and fair opportunity to present any evidence it considered relevant to the matters being disputed, including the matters on which it now seeks rehearing. If SWBT had thought that the record was incomplete after two days of on-the-record discussion, it had only to ask for an opportunity to present additional witnesses or information, as it frequently has done in the past. If SWBT took issue with statements of the CLECs during the proceedings, its lawyers (and its experts)

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[1] SWBT's witnesses included the following (a sample transcript reference is provided for each): Randy Dysart, Tr. 7; John Locus, Tr. 10; Derrick Hamilton, Tr. 22; Don McQueary, Tr. 66; Brian Noland, Tr. 80; Elizabeth Hamm, Tr. 87; Angie Cullen, Tr. 89; Justin Brown, Tr. 105; Vicki McDonald, Tr. 182; Larry Vandegriff, Tr. 418; and Larry Gentsch, Tr. 481.

had the opportunity to question the CLEC representatives or offer rebuttal information. SWBT, or any party, was free to assert that one or more disputed issues required additional evidence, or the opportunity for discovery or more formal cross-examination, before being presented to the Commission for decision.

Indeed, the adequacy of the opportunity to present evidence is apparent from the workshop discussion of SWBT's implementation of the flow-through performance measure (PM 13), one of the subjects of SWBT's motion for rehearing. In pre-workshop filings, AT&T and Birch had raised a question regarding SWBT's implementation of PM 13, specifically, whether and how SWBT had implemented the 1999 business rule requirement to capture "orders that would flow through EASE." When that issue was reached during the workshops, SWBT disclosed for the first time that only "the resale type orders that would flow through EASE are included in the base for PM 13." Tr. 194. To the presiding Staff who have worked with the development of SWBT's performance measures throughout the 271 proceeding, it was immediately apparent that SWBT's interpretation – which excluded from measurement an unknown quantity of CLEC UNE-P orders related to POTS-type service despite the fact that the equivalent retail POTS orders flow through SWBT's EASE system -- was at odds with the plain meaning of the business rule and the underlying intent to provide a meaningful test of whether the level of electronic order processing that SWBT provides to CLECs and to its own retail operations was nondiscriminatory. *See* Tr.198-99. SWBT's disclosure sent Staff, in its own words, "reeling . . . from the realization that the data collected under 13 wasn't what we thought it was." But, rather than close the record on this important issue with SWBT's surprising disclosure, Staff provided for SWBT to make a filing as to how it was

implementing PM 13, Tr. 494, offering SWBT an opportunity to attempt to justify the way it has reported data under this flow-through measure. SWBT took that opportunity, and only thereafter did the Commission reach its decision that SWBT had failed to follow the business rule and that PM data should be audited and restated, with Tier 1 damages to be paid on the restated data using the Tier 1 High damages multiplier.[2]

These proceedings were more than adequate to constitute the "arbitration" provided for in the T2A provision establishing the six-month review process, both as a matter of contract interpretation and due process. T2A, Attachment 17, § 6.4.[3] SWBT's contrary interpretation – under which the Commission's Order at the conclusion of a six-month review is merely a device for commencing arbitration proceedings – would so protract the process of changing SWBT performance measures as to render the six-month review useless except as a means for making changes agreeable to SWBT. Nor can SWBT raise any serious due process objection to an order that was entered after SWBT

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[2] The Commission's decision in this regard was well justified by the facts and the law, as set forth in AT&T's Motion to Strike or, In the Alternative, Response to SWBT's Motion for Rehearing and Clarification. As summarized there, the evidence fully supports the conclusion that SWBT knew or should have known that the business rule as revised in mid-1999 required SWBT to include all CLEC UNE-P orders, if the equivalent SWBT retail order type would flow through EASE. Indeed, the manner in which SWBT represents in its Response that it will implement this requirement is identical to the manner in which it indicated it would implement the requirement almost two years ago, as discussed in AT&T's Motion to Strike. Compare SWBT's Response at p. 3 ("SWBT's plan is to classify the orders that are not MOG eligible as MOG eligible in LASR,") with Workshop, TPUC Docket No. 21000 Tr. at 22-23 (October 1, 1999) (Dysart) (indicating that SWBT was "trying to identify the individual services that flow through EASE," and was considering causing its LASR system to recognize those orders "that flow through EASE and don't flow through EDI as MOG-eligible for the purposes of the measurement to get the denominator.")

[3] The fact that the six-month review proceedings provide the arbitration referenced in section 6.4 of Attachment 17 does not mean that SWBT's motion for rehearing, filed 31 days after Order No. 33, was timely. *See* SWBT Reply at 3. As pointed out in AT&T's Motion to Strike, at 2-3 and n. 2, either SWBT's motion for rehearing is subject to Procedural Rule 22. 264, in which case it was filed 11 days late, or it is not subject to that rule, in which case there is no Commission rule or procedure that permits such a motion. However, given the cloud that SWBT's position has placed over the continuing utility of Project No. 20400 and the use of the collaborative process, AT&T requests that, if SWBT's motion is stricken as untimely, the order striking that motion should affirm that Order No. 33 is final and binding, and neither requires nor contemplates a separate arbitration related to the matters decided in that Order.

was provided two days of on-the-record proceedings, with eleven of its own witnesses testifying, and the opportunity to present written argument without limitation.

Accordingly, the Commission not only should deny SWBT's motion for rehearing, but should affirm that Order No. 33 binds SWBT and other parties to interconnection agreements that include Attachment 17 of the T2A, without the need for a separate arbitration or other further proceedings.

II. SWBT's Construction Of Order No. 33 Would Undermine the Six-Month Review Process and Require Reconsideration of the Texas Remedy Plan By This Commission and the FCC

If SWBT is free to reject the requirements of Commission Orders in Project No. 20400 (and, in particular, in six-month performance measurement reviews), unless the requirement is re-ordered in a separate, subsequent arbitration, the usefulness of these proceedings will be greatly undermined and the structure created by the Commission for post-271 enforcement of SWBT's obligations under the Act will be at risk. Indeed, if SWBT's interpretation of Order No. 33 were to prevail, that fact would warrant reexamination of the conclusions by this Commission and the FCC that granting SWBT's application for long-distance authority was in the public interest.

SWBT's position would reduce the six-month review process (or any other matter addressed in Project No. 20400 through a similar collaborative process) to nothing more than a Staff-supervised negotiation, to be followed by separate arbitration proceedings on disputed issues. If this Commission were to hold that SWBT is free to compel a separate arbitration proceeding before complying with provisions of an order like Order No. 33, SWBT's incentive to reach agreement on any point of concern to CLECs is virtually eliminated. At the same time, a CLEC who may have identified a serious flaw in the

performance measures or SWBT's implementation will have to add the expense of a separate arbitration to the already considerable effort required to participate in the collaborative process, if it is to have any serious prospects for bringing about a change that SWBT is likely to dispute.

In the first two six-month review proceedings, much has been accomplished by agreement. To anyone who has participated in that process, it is self-evident that the success in reaching agreement was largely attributable to all parties' expectation that the Commission would make its "cut" on the unresolved issues. Time and again it has been evident that parties compromised, based on their expectations about the "cuts" that the Commission was likely to make if they did not. SWBT's position would fundamentally alter the negotiating dynamic in the six-month review process. All parties would know that, whatever "cut" the Commission makes, SWBT (or, presumably, CLECs) could call "King's X" if they do not like the ruling, and the matter would remain in dispute pending a separate arbitration.

Resource-constrained CLECs would have to seriously reevaluate participation in collaborative proceedings under the regime SWBT proposes. To the extent that participation continued, the Commission could expect such proceedings to result in less agreement, and in more litigation on the issues that are not resolved by agreement (or more SWBT victories by default when CLECs cannot devote the resources required to conduct separate arbitrations, over and above the expense of collaborative proceedings).

In concluding that the public interest would be met by grant of SWBT's Texas 271 application, the FCC relied on its finding that the performance remedy plan in the T2A "provides additional assurance that the local market will remain open after SWBT

receives section 271 authorization." *SBC Texas Order* ¶¶ 417, 420. In reaching that conclusion, the FCC rejected CLEC objections to the scope and meaningfulness of SWBT's performance measures, finding that "the plan is not static." *Id.* at ¶ 425. The FCC cited this Commission's report that "a six month review process is in place to assure that the plan is not static in nature. The Texas Commission, in conjunction with SWBT and the competitive LECs, will engage in comprehensive review of the performance measures to determine if commercial experience indicates that changes are necessary." *Id.* at n. 1243. Regular, meaningful review of the measurements was important to the FCC's conclusions about the Texas remedy plan: "[t]his continuing ability of the measurements to evolve is an important feature because it allows the Plan to reflect changes in the telecommunications industry and in the Texas market." *Id.* at ¶ 425.

If SWBT's view of the six-month review process and Order No. 33 were allowed to prevail, then SWBT will have the discretion to forestall any evolution of the performance measurements that is not to its liking, unless and until that change is established through the effort and expense of a separate arbitration, outside of the six-month review process itself. Establishing and enforcing performance measurements in a time frame that is competitively relevant to fast-changing technology – which has been difficult enough under the T2A to date -- will become an impossibility, whenever the issue matters enough to SWBT to force separate arbitration proceedings.

Thus, if the Commission were to conclude that it is legally constrained to agree that Order No. 33 does not bind SWBT on disputed points, unless those points are established through separate arbitration, that conclusion would materially affect the basis for a finding on which the FCC relied to grant SBC's Texas 271 application. If this

Commission cannot expect SWBT to follow the orders that it enters in the project the Commission has established for "Section 271 Compliance Monitoring," without going through a separate arbitration proceeding each time it enters an order in Project No. 20400 to which SWBT takes exception, then it would be incumbent on the Commission to advise the FCC of that development, so that it may consider appropriate action with respect to SBC's ongoing long-distance authority.[4]

Fortunately, the Commission is under no constraint to agree with the position presented by SWBT in its motion for rehearing and response. SWBT has had ample opportunity to, and did, arbitrate the issues that were decided in Order No. 33, about which it now seeks rehearing.

[4] AT&T also suggests that such an action by the Texas Commission would be appropriate because SWBT is no longer in compliance with Order No. 25 in Project No. 16251 or the Memorandum of Understanding. One of the specific recommendations made by the Commission in Order No. 25 related to SWBT's "corporate attitude." Specifically, Public Interest Recommendation No. 12 provided that "SWBT needs to establish that it is following all Commission orders referenced in this recommendation and that it intends to follow future directives of the Commission." SWBT purported to comply with that Recommendation by including the following language in the General Terms & Conditions of the T2A: "SWBT represented that it would follow certain Commission's arbitration awards and other decisions, as set forth elsewhere in this Agreement." T2A, General Terms & Conditions at p. 1. Moreover, one of the specific commitments that SWBT made in the Memorandum Of Understanding that it entered with the Commission is that "SWBT commits to meet every six months with the CLECs and Commission Staff to review the performance measures approved by the Commission in this proceeding." TPUC Docket No. 16251, MOU, Attachment A, at p. 11 (April 26, 1999). For SWBT to take the position that it takes in its Motion for Rehearing and Response that it does not need to abide by Order No. 33 unless it agrees to the provisions therein represents a fundamental shift in corporate attitude and flaunting of prior commitments made during the collaborative process on which the Commission relied in recommending long-distance relief in Texas.

WHEREFORE, PREMISES CONSIDERED, AT&T respectfully requests that the Commission strike and/or deny SWBT's Motion for Rehearing, and that the Commission affirm that Order No. 33 binds SWBT, without the need for a separate arbitration or other further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served by hand delivery or via facsimile and/or electronic mail on all parties of record in this proceeding on the 20th day of July, 2001.

Michelle Sloane Bourianoff

Exhibit 2

AT&T
08/24/01

TABLE OF CONTENTS

PROJECT NO. 20400

SECTION 271 COMPLIANCE MONITORING OF SOUTHWESTERN BELL TELEPHONE COMPANY OF TEXAS	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

AT&T COMMUNICATIONS OF TEXAS, L.P.'S RESPONSE TO SWBT'S LETTER REGARDING PM 27 (REDACTED VERSION)

List of Files:
G:\Law\michelle\letters\PM 27 letter.doc

Original + 22

cc: Ms. Donna Geiger (Confidential Version - hand delivered)
Mr. Nara Srinivasa (Confidential Version – hand delivered)
All Parties of Record

August 24, 2001

Ms. Cindy Malone
Southwestern Bell Telephone Company
1616 Guadalupe, Room 600
Austin, Texas 78701

Re: Project No. 20400; Section 271 Compliance
Monitoring of Southwestern Bell Telephone Company

Dear Cindy:

This letter is to respond to your letter to Judges Geiger and Srinivasa informing the Commission that SWBT has withheld payment of liquidated damages to AT&T for acknowledged parity violations under PM 27 that SWBT has reported since April 2001. SWBT purported to invoke Attachment 17, section 7.2 of the T2A as the basis for withholding payment of Tier 1 liquidated damages otherwise due for these violations. This letter is intended to provide SWBT an opportunity to promptly reverse this unjustified action.

By withholding Tier 1 payments under these circumstances, SWBT has placed itself in breach of the Texas interconnection agreement between SWBT and AT&T, which incorporates Attachment 17 of the T2A. SWBT cannot begin to demonstrate that its recent noncompliance with PM 27 resulted from an act or omission of AT&T ***"in bad faith,"*** which is required in order to excuse Tier 1 payments under section 7.2. Indeed, your letter carefully avoids any direct assertion that AT&T has acted (or failed to act) in bad faith, and your own comments regarding AT&T's ordering practices confirm that SWBT has no grounds on which to accuse AT&T of bad faith. SWBT's action also is in breach of the procedural terms of Attachment 17, specifically section 10.4, which prohibits SWBT from withholding liquidated damages on grounds of CLEC fault without commencing an expedited dispute resolution proceeding before the Commission.

AT&T has reviewed your letter and considered SWBT's communications on this subject at the account team level. AT&T finds that SWBT has provided no reason why we should accept anything less than strict compliance with the remedy plan that SWBT has so vigorously advocated and succeeded in imposing